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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1060~~ 70-49

STATE OF HAWAII,

Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA; UNION OIL COMPANY OF CALIFORNIA; SHELL OIL COMPANY and CHEVRON ASPHALT COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

Introduction

The State of California files this amicus curiae brief in support of Hawaii pursuant to Rule 42 of the Rules of this Court.

This Court in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), held that a state could sue *parens patriae* to recover for damages to the economy under the antitrust laws.

The facts alleged in the present case and those presented in *Georgia, supra,* are similar. In each case the state sued as *parens patriae* alleging a price-fixing conspiracy and in each case the state sought to recover for similar types of damages to the economy.

Notwithstanding *Georgia v. Pennsylvania R. Co., supra*, the Ninth Circuit held that Hawaii, as *parens patriae*, could not sue under Section 4 of the Clayton Act to recover damages to its general economy. Hawaii's petition for certiorari from this decision has been granted. Amicus supports Hawaii's contention that the opinion of the Circuit Court in denying this cause of action conflicts with the holding by this Court in *Georgia* and impairs the purpose of the antitrust laws.

Pursuant to the Congressional policy of encouraging private law enforcement of the antitrust laws California, and other states, have brought treble damage and injunctive actions to enforce these laws. In doing so, it has become evident that the type of harm capable of being done by those who violate the antitrust laws results in damage not only to specific persons (including states in their proprietary capacity) but also to the mass of consumers, as well as to the general economy and welfare of the state.

Under such circumstances, states have begun utilizing the *parens patriae* concept in order to fully recover for the harm done by violators of the antitrust laws. Perhaps the most notable are the automobile air pollution cases brought by California and other states,[1] against the automobile manufacturers alleging a conspiracy to delay the development and installation of smog devices on automobiles. The very issue before this

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[1]Approximately 34 states have filed lawsuits, all of which have been consolidated for pre-trial proceedings in the United States District Court for the Central District of California. *In re Multidistrict Vehicle Air Pollution*, M.D.L. No. 31.

Court is presently pending on interlocutory appeal before the Ninth Circuit in the air pollution cases.

The decision by this Court on the question of *parens patriae* is therefore of great importance to not only pending cases, but to the future role of states in their enforcement of the antitrust laws.

Hawaii has also raised in its brief the bringing of a *parens patriae* cause of action to recover damages as representative of the consumers in Hawaii (Hawaii's Brief, pp. 62-67). There are presently pending in federal courts other antitrust cases which states have brought alleging *parens patriae* representation of consumers, the most notable being the broad spectrum antibiotic drug cases brought by amicus and other states. California agrees with Hawaii that such a cause of action is proper in antitrust cases.

Unless reversed, the *Hawaii* decision will adversely effect the ability of states to recover for injuries resulting from violations of the antitrust laws and will severely curtail the Congressional policy of encouraging private law enforcement of antitrust violations.

Nature of Case

The nature of the case has been set forth in detail in Hawaii's brief. Briefly, Hawaii's complaint alleged that the defendants conspired to fix the price of gasoline and other products sold in the State of Hawaii.

Count One alleged a cause of action by the state suing in its proprietary capacity. This cause of action is not before the Court.

Count Two was brought ". . . by virtue of its [Hawaii's] duty to protect the general welfare of the State and its citizens, acting herein as *parens patriae,* trustee, guardian and representative of its citizens, to recover damages for, and secure injunctive relief against, the violations of the antitrust laws, hereinbefore alleged." (Hawaii's Brief, p. 8.) This count alleged that the conspiracy of the defendants injured and adversely affected the economy and prosperity of the State of Hawaii.

Count Three sought recovery pursuant to Rule 23 of the Federal Rules of Civil Procedure as representative of a class comprised of all purchasers of the defendants' gasoline and other refined petroleum products.

The District Court sustained Count Two but dismissed Count Three. The dismissal was not appealed by *Hawaii.* The Court of Appeals reversed the District Court in regard to Count Two from which decision Hawaii's petition for certiorari has been granted.

ARGUMENT

I

Hawaii, as Parens Patriae, States a Cause of Action for Damages to Its Economy Under Section 4 of the Clayton Act

In dismissing Hawaii's cause of action to recover as *parens patriae* for damages to the economy the Ninth Circuit found that the general economy was an abstraction and had no value in itself. The Court went on to state that even if injury to the economy could be measured, it was not an injury to business or property within the meaning of Section 4 of the Clayton Act, and furthermore, the injury was too indirect and remote to permit recovery. The Circuit Court erred in these conclusions.

A. The Economy Was Not Held to Be an Abstraction in Georgia v. Pennsylvania R. Co.

The injury and damages set forth in Count Two of Hawaii's complaint are similar to those alleged in the *Georgia* case. The Ninth Circuit was concerned with Hawaii's inability to articulate a precise measure of damages and found that the economy was an abstraction for which no damages could be recovered.

This Court, however, had no problem with the economy being an abstraction when it decided that Georgia could allege an action for damage to its economy under the antitrust laws.

> ". . . The rights which Georgia asserts, *parens patriae*, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. . . . And we find no indication that,

> when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts."
>
> *Georgia v. Pennsylvania R. Co., supra*, at p. 447.
>
> "Since the claim which Georgia asserts as *parens patriae* as well as proprietor meets the standards of justiciability and since Georgia is a 'person' entitled to enforce the civil sanctions of the anti-trust laws, the reasons which have been advanced for denying Georgia the opportunity to present her cause of action to this Court fail."
>
> *Georgia v. Pennsylvania R. Co., supra*, at p. 452.

The civil sanctions of the antitrust laws provide for means of relief by both injunction and damages (Section 4 and Section 16 of the Clayton Act). If an illegal act did indeed occur, resulting in injury to Hawaii's economy, then Hawaii should not be deprived of its statutory right to seek and prove damages.

This Court made it clear that it denied Georgia's action for damages only because the injury was based on discrimination in railroad rates and tariffs. Such a recovery was precluded by *Keogh v. C. & N. W. Ry. Co.*, 260 U.S. 156 (1922), a case which held that private antitrust damage actions cannot be brought in regard to rates approved by the Interstate Commerce Commission.

Nowhere in *Georgia* did this Court hold that a state may not sue to recover for damages to the economy. On the contrary, that decision specifically stated that a state, suing under the civil sanctions of the antitrust laws, could state a cause of action for such damages.

As to requiring a precise measure of damage, Hawaii should not be compelled to establish its proof at the pleading stage. Under the liberal rules of pleadings in antitrust cases, all Hawaii need do to withstand a motion to dismiss was allege a violation of Section 1 of the Sherman Act and that it was damaged thereby. *Radiant Burners v. Peoples Gas Co.*, 364 U.S. 656, 660 (1961). This it has done.

By its action the Court failed to distinguish between the fact of damage and the measure of damage. The fact of damage alleged by Hawaii paralleled that asserted in the *Georgia* case and Hawaii should not have been precluded at the pleading stage from the opportunity of proving damages at trial. If Hawaii can in fact prove that its economy has been damaged, uncertainty as to the amount of damage should not prevent recovery. *Bigelow v. RKO Radio Pictures*, 327 U.S. 252 (1946).

B. Injury to Business or Property

Even if damages to the economy could be measured, the Ninth Circuit stated that such injury does not constitute injury to business or property within the meaning of Section 4 of the Clayton Act. In recognizing the right of a state to sue under the antitrust laws for damages to its economy this Court stated:

> ". . . Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate."

Georgia v. Pennsylvania R. Co., supra, at p. 451.

The interests that Hawaii seeks to protect are the same as those alleged by Georgia which were recognized by this Court as being legitimate interests subject to the protection by a state under the antitrust laws. In finding that Hawaii was not injured in its business or property the Circuit Court narrowly interpreted the meaning of these words.

There is no simple definition of the terms "business or property". Nor, in our rapidly changing society, should the courts attempt a definition which purports to describe for all time exactly what constitutes "business or property".

In *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964), the court noted that the words "business or property" are used in the disjunctive and that "property" has wider scope and is more extensive than the word "business".

> ". . . If it is decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses 'property.' "
>
> *Waldron v. British Petroleum Co., supra*, at 86.

This Court has time and again held that a state has sufficient interest to bring lawsuits for the purpose of protecting the health, comfort and general welfare of its people. *Penna. v. West Virginia*, 262 U.S. 553 (1923); *Kansas v. Colorado*, 206 U.S. 46 (1907); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). Whether it be deemed "business" or "property," the interest of Hawaii in protecting its economy and the general welfare of its people is certainly subject to judicial protection within the meaning of Section 4 of the Clayton Act.

C. The Injury to Hawaii Was Not Remote

In dismissing Count Two the Ninth Circuit found that the injury to the economy was too remote. The remoteness test is one which has been self-imposed by lower courts and is not a criteria contained in the antitrust laws. In fact, this Court in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), reversed a decision by the Ninth Circuit where the Circuit Court denied a jury verdict for petitioner on the ground that the injury suffered was too remote[2] from the unlawful activity to permit recovery.

Moreover, in the remoteness cases denying an action to a particular plaintiff which were relied upon by the Ninth Circuit, there was always a party with a more proximate injury who was available to bring the action. The specific injuries alleged by Hawaii to its economy clearly reveal that they were not remote and certainly there is no more appropriate party than Hawaii to bring this action.

In spite of the similarities with *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), the Ninth Circuit found that injury to the economy was too remote and held as a matter of law that Hawaii could not bring a *parens patriae* action to recover for damages. This decision not only conflicts with *Georgia*, but fails to recognize the propriety of a *parens patriae* action by a state for damage to its economy where facts clearly reveal an impact upon a state's economy which is not remote. One good example is the air pollution case where the conspiracy involved not ordinary price fixing but a

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[2]The Court of Appeals described Perkins' injury as "fourth level" since he claimed injury from a competitor who was the "third" purchaser of the gasoline sold by Standard Oil. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647 (1969).

conspiracy which, as a natural consequence, injured the economy.

Unless reversed, the Hawaii decision would preclude the bringing of a *parens patriae* cause of action by a state to recover for damage to its economy regardless of the facts constituting violations of the antitrust laws.

II

Suits by a State Parens Patriae in Conspiracies Effecting Consumer Goods Are Essential for the Fulfillment of the Enforcement of the Antitrust Laws

A. Introduction

Amicus supports the contention raised by *Hawaii* that in a conspiracy injuring a large number of consumers, who will otherwise be unable to present their damage claims, a state has a proper role to sue *parens patriae*.

It is well established that in permitting treble damage actions the intent of Congress was to encourage the private law enforcement of antitrust violations. To the extent that private antitrust enforcement is thwarted, because of the type of violation, the effect of these laws becomes diluted.

The best example of where antitrust violations may occur without fear of punishment, and reap large returns to the violators, are those conspiracies which injure a large group of consumers and involve small purchases. Most consumers injured by such a conspiracy will not recover either on an individual or class action basis thereby enabling the defendants to retain their unlawful profits.

Consistent with the private antitrust enforcement policy, states should have *parens patriae* standing to present evidence of total consumer purchases in antitrust actions

based on violations involving consumer goods. In addition to policy factors requiring this result, the historical precedents regarding *parens patriae* are consistent with this approach. The doctrine was created and applied to deal with situations in which, but for this concept, there would be no remedy for illegal acts.

The doctrine of *parens patriae* originated when the sovereign was granted the right to represent its citizens who were *non sui juris*. It was subsequently used to allow the sovereign to sue when all, or substantially all, of its citizens had been injured. Permitting a state to sue *parens patriae* in antitrust cases where its citizens have been injured in a manner which realistically precludes them from bringing their own actions is another logical application of the *parens patriae* doctrine.

B. This Court Has Recognized Treble Damage Actions as a Means of Private Enforcement of the Antitrust Laws

In the case of *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 130-31 (1969), Justice White stated:

> "Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. . . ."

Vigorous private enforcement of the antritrust laws has repeatedly been recognized as being "a bulwark of antitrust enforcement." *Perma Mufflers v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968).

The essence of private enforcement has been the establishment of procedures which warn those who violate the antitrust laws that they will have to pay damages equal to three times the amount of damages caused by their unlawful activities. If there is no like-

lihood that treble damage actions can be successfully brought against those who violate the laws, the deterrent effect of private enforcement actions will necessarily be severely diminished. Thus, the permitting of *parens patriae* actions in consumer conspiracies is consistent with the purpose of permitting private enforcement of the antitrust laws.

C. The Great Bulk of Consumer Claims Will Not Be Presented in a Traditional Antitrust Case Involving Consumer Goods

The possibility of violations of the antitrust laws relating to consumer goods is apparent.[3]

The very nature of consumer goods is such that the possibility of successful treble damage actions is small. The facts in the instant case clearly demonstrate the problems involved in bringing a successful treble damage action in relation to consumer goods. Even with a product such as gasoline which is purchased on a regular basis, and in which purchases may amount to several hundred or even several thousand dollars for an individual consumer during a conspiracy of several years, it is not realistically possible due to the notorious expenses of suit for consumers to bring individual actions.

Even if a traditional class action was established, it would not resolve the problem of presenting the claims of all consumers if each individual class member is required to prove his individual purchases in order to recover damages. It is apparent that when this procedure is used the defendants will not be required to pay dam-

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[3]Recent cases relating to consumer goods have involved tetracycline, ampicillin, benzothiadizaine, eggs, gasoline, quinidine and potato chips.

ages based on all sales. The realities of life are that: (a) it is simply impossible to get everybody in a large consumer class to participate in a class action; (b) even among those who desire to participate the ability may be lacking because of such things as missing records to prove purchases; and (c) in relation to conspiracies in certain products, such as drugs, the consumer will frequently not even know that he purchased the product in suit. The result is that even if a class is established, most of the claims involved will not be presented.[4]

In cases involving consumer goods, such as eggs or potato chips, it is apparent that most consumers will not have actual proof of purchases. Even in those situations involving commodities where there may be documents to prove purchases, such as credit card slips for the purchase of gasoline, the proof of purchase will often have disappeared. The result is that if a conspiracy injures consumers and it is necessary to present records of purchases to prove damages it will be difficult, if not impossible, for most members of a class to recover. The defendants, therefore, will not be penalized by being separated from their illegal profits and hence the alleged deterrent effect of treble damage actions will not exist in relation to conspiracies involving consumer goods.

It is true that the doctrine established in the case of *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1968) may resolve this problem on occasion by providing that the cause of action resides with a party

[4]It is noted that in the Second Circuit decision approving the settlement reached by certain plaintiffs in the broad spectrum antibiotic cases only 38,000 claims were received from 43 settling states, despite the fact that obviously millions of people used the drug in question. *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970).

who can realistically bring a treble damage action. This could be the manufacturer, wholesaler, or some other party in the line of distribution. However, it is equally true that there may well be consumer situations which fall within the exception set forth in *Hanover* regarding situations analogous to "cost plus contracts."

Such a situation is exemplified by the broad spectrum antibiotic drug cases. In those cases the product which was the subject of the conspiracy passed unchanged in form through the chain of distribution. Each level included a price markup. This marketing process is analogous to a "cost plus contract" in that it can be easily proven that the original overcharge was passed on to the consumer. This method of pricing is normal within consumer markets.

In addition, as illustrated by the instant case, there may be no independent intervening parties between the violator and consumer since the defendant Standard Oil sells through their own retail outlets and the consumer directly pays the amount of the alleged illegal overcharge.

D. - If Consumer Claims Are Not Presented, There Can Be No Effective Private Enforcement

If it is assumed that only a small portion of the claims in an antitrust consumer conspiracy will be presented in a traditional class action, then although damages are trebled the defendants will not even be required to pay full single damages. Unless a state is permitted as *parens patriae* to present evidence of total purchases so that full damages can be assessed, the defendants will retain their illegal profits and have achieved the goals intended by their unlawful conspiracy. The entire thrust of treble damage actions to provide effective private enforcement would thus be negated.

III

The Origins and Development of the Common Law Doctrine of Parens Patriae Justify Its Application to Treble Damage Actions Involving Consumer Claims

The origin of the common law doctrine of *parens patriae* and its subsequent development by the courts indicate that it is an appropriate and ideal legal vehicle to use in presenting claims of consumers injured by antitrust violations in consumer markets.

A. The Doctrine of Parens Patriae Originated in the Authority of the Sovereign to Represent Persons Who Are Non Sui Juris

In early English common law, idiots, incompetents and infants were *non sui juris*. Because the individual incompetent was unable to appear in court, the legal doctrine of *parens patriae* was developed. This doctrine provided that the sovereign through its attorney general could represent all persons who were *non sui juris*. See *Attorney General v. Dublin (Mayor of)*, 1 Bligh N.S. 312 (1827), 4 Eng. Rep. 888 (1901); *Shaftsbury (Earl of) v. Shaftsbury*, Gilb, Rep. 172 (1725), 25 Eng. Rep. 121 (1903).

The need for such a legal doctrine is clear. The government could not permit a situation in which, for example, an incompetent could have his property converted but because he was *non sui juris* no one could bring an action in conversion. The law allowed the sovereign to stand in a representative capacity on behalf of the person who was *non sui juris*.

The crucial elements regarding the origin of *parens patriae* in relation to the instant case are: (1) it is a

common law doctrine and therefore subject to expansion and development by this common law court; (2) it is an interstitial doctrine designed to fill a gap in the law where the need for such gap filling is obvious; and (3) the state in bringing an action *parens patriae* was not bringing it to recover for injury done to the state itself.

B. The Parens Patriae Doctrine Has Been Applied to Allow States to Represent Large Masses of Its Citizens

In the United States the doctrine of *parens patriae* hase been used by states to bring actions in situations where the mass of their citizens were injured or threatened. In these cases, the action is not brought on behalf of an individual person who is *non sui juris*, but is brought on behalf of an amorphous mass of citizens. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 451 (1945). The requisite element for the state bringing *parens patriae* action in these cases was the existence of an injury to a large number of its citizens. Most of these actions were invariably injunctive in nature. The state in its capacity as *parens patriae* would seek to enjoin some deleterious activity, not because it was injuring the state in its proprietary capacity, but because it was injuring or threatening to injure its citizens. These were situations in which it would have been unreasonable and impractical to expect any one citizen to bring an action because of the magnitude of the problem and because no one citizen's injury was markedly different from that of any other citizen.

C. Parens Patriae Should Be Developed to Permit the State to Present All Antitrust Claims Based on Consumer Sales

The fundamental issue presented by the consumer representation aspect of this case is that absent such representation an antitrust conspiracy can cause injury to vast numbers of consumers and damage claims will not be made for such injuries. To this extent, the present case is quite analogous to those cases permitting *parens patriae* actions where there has been injury to one who is *non sui juris*—or to a large number of persons—who are unable to sue on their own behalf.

In permitting *parens patriae* by a state in antitrust cases, as representative of its consumer citizens, damage claims of consumers who do not otherwise present their claims can be brought before the court and result in separating the defendants from their illegally obtained profits. The idea that a person should have freedom to injure others and remain immune from civil actions is abhorrent to any legal system. Thus, the application of *parens patriae* actions in consumer conspiracies is consistent with the purpose and development of the doctrine of *parens patriae*.

D. Parens Patriae Is a Common Law Doctrine Properly Subject to Development by the Courts

The concept of *parens patriae*, as a common law doctrine is properly subject to development by the courts. In describing the need to develop the common law former Chief Justice Roger Traynor of the California Supreme Court stated:

". . . Our responsibility was . . . to create the most rational rule possible for a novel situation, almost but not quite covered by a statute."

"Statutes Revolving in Common Law Orbits," 43 Cal. B.J. 509, 531-532 (1968).

It has been argued that changes in the law in relation to *parens patriae* should be directed to Congress rather than the courts. This is, of course, an argument made by defendants at all times when attempting to stop developments of the law which they find antithetical to their interest. While Congress may act if it feels it appropriate, the courts nevertheless have the right to develop the doctrine. The right of courts to keep the common law viable was noted by Chief Justice Traynor stating:

"Confronted with a moribund rule that was patently awaiting a coup de grace, we noted that the rule had been judicially created in the first place and hence it would be inappropriate to await its undoing by the Legislature. 'In effect the contention is a request that courts abdicate their responsibility for the upkeep of the common law. That upkeep it needs continuously, as this case damonstrates.'" "Statutes Revolving in Common Law Orbits," *supra*, at 524.

IV

The Bringing of Parens Patriae Actions Is a Function of the Sovereign but They Are Not Necessarily Brought on Behalf of the Sovereign

The right of a state to sue as *parens patriae* has created a great deal of confusion, both conceptual and semantic. The confusion is, however, susceptible to resolution upon a careful analysis of the cases and consideration of the concepts involved.

The requisites for a state filing an action *parens patriae* are not the same as those required for a state suing in a quasi-sovereign capacity. The belief that a state must have an interest independent of and behind the title of its citizens applies only when the suit concerns quasi-sovereign interests. To sue in a *parens patriae* capacity, however, there need not be any injury to the state itself and the need for injury to "business or property" under Section 4 of the Clayton Act is satisfied if such injury has occurred to those who are represented in the *parens patriae* action.

A. Suits in a Quasi-Sovereign Capacity

A state can bring an antitrust action in its sovereign capacity to recover for injuries suffered as a sovereign. *Georgia v. Evans,* 316 U.S. 159 (1942). In such a situation, the state is comparable to a citizen suing to recover for injuries to the citizen caused by an antitrust conspiracy. The instant case is, in part, such an action. Hawaii has sued to recover damages for injury in its proprietary capacity resulting from price fixing on gasoline purchased for use in state cars. The injury has been suffered by the State, qua State, and any damages recovered are to be retained by the State.

The quasi-sovereign capacity of a state is less clear. The concept is specifically mentioned in *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907), where Georgia sued to enjoin the emission of noxious gases which were emitted by a company in a neighboring state and were carried into Georgia. Justice Holmes stated:

> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit

between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads." 206 U.S. at 237.

While a state can bring an action in its capacity as sovereign for injury to property owned by the state, in *Tennessee Copper* it was not injury to the state's property that was the basis of the action. But, ". . . the State has an interest independent of and behind the titles of its citizens. . . . It has the last word as to whether its mountains shall be stripped of their forests . . . It might have to pay individuals before it could utter that word, but with it remains the final power." Quasi-sovereignty is then, at least in part, the residual interest of the state in all the real property within the state. As Justice Holmes notes, the state "has the last word" regarding usage of property within the state. "It might

have to pay" (*i.e.*, condemn the property) but it has the last word.

Thus, under *Tennessee Copper* a state may sue in a quasi-sovereign capacity to protect its residual interests. Of particular importance in this decision is the fact that it was the state interest that was being protected by the state. The state was not suing to protect the property of individuals even though it may have been a necessary incidental effect of the suit. Since the state was suing to protect its own interest in property, it necessarily had to have an interest to protect—thus the statement "a State has an interest independent of and behind the title of its citizens."

B. Suits by a State Parens Patriae

In evaluating the requisites of a *parens patriae* suit the nature of a quasi-sovereign suit must be distinguished. Acting as *parens patriae* is one of the functions of sovereignty, but in suing as *parens patriae* a state does not necessarily sue to recover damages for injuries suffered by the state. Rather, the state sues *parens patriae* as a representative of persons who have been wrongfully injured but cannot realistically sue on their own behalf.

Thus, there is no need for a state suing *parens patriae* to have an interest independent of and behind the title of its citizens. In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), this Court, first directing its attention to whether Georgia could sue *parens patriae* under the antitrust laws determined that it could

bring such an action because the civil remedies were not intended to restrict states to protecting only their proprietary interests. In holding that a state could sue *parens patriae* this Court properly made no reference to the requisite that a state have an interest independent of and behind the title of its citizens.[5]

The state in suing as *parens patriae* acts as a "trustee, guardian or representative of all her citizens." *Louisiana v. Texas*, 176 U.S. 1, 19 (1900). Acting in this capacity, it is no more necessary that the state have suffered an injury than it is necessary that a guardian be personally injured before he can sue on behalf of his ward.

This fact is important in applying the requirement of Section 4 of the Clayton Act that a plaintiff be injured in his business or property. Since the state is suing on behalf of persons who will not be filing their own claims, the court should look to the represented parties to see if they have been injured in their business or property. Where a state is suing *parens patriae* to recover for over-charges to a consumer class, there can be no doubt that there was injury to the "business or property" of those consumers.

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[5]It was only when this Court directed its attention to the issue of original jurisdiction that reference was made to the need of a state having an interest independent of and behind the title of its citizens as this relates to the issue of standing to bring an original jurisdiction action. Cases often cited for the proposition that a state cannot sue *parens patriae* without an independent interest do not deal with the traditional concept of *parens patriae* as evolved from the common law. *E.g., Oklahoma v. Cook*, 304 U.S. 387 (1938); *N.Y. v. Louisiana*, 108 U.S. 76 (1883).

V

The Parens Patriae Doctrine in Recovering for Consumer Claims Is Best Used in Conjunction With a Rule 23 Class Action

A *parens patriae* action for consumers is most efficient when used in conjunction with a class action. *State Protection of its Economy and Environment: Parens Patriae Suits for Damages,* 6 Columbia Journal of Law and Social Problems, 411, 430-431 (1970). Under this approach, a class action would be established on behalf of all consumers who had purchased the goods in question during the alleged conspiracy period.

Normal class action procedures would be followed whereby notice would be given to members of the class, the method of notice depending on the facts of each case. Those persons who do not elect to be excluded from the class would be bound by the judgment. Those persons who elect to be excluded would not be bound by the judgment and would be free to pursue their own remedies.

In the trial of the class action, the class representative would be allowed to prove total sales of the consumer good in question within the state.[6] Damages would then be assessed against defendants on the basis of applying the percentage overcharge to the total sales to determine single damages. Trebling the single damages thus ascertained would establish the measure of total damages to be paid by defendants.

The fund thus created would be used for two primary purposes. First, to finance a program to bring forth

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[6]Such a procedure has been approved by the Honorable Miles W. Lord in the currently pending broad spectrum antibiotic cases. *In re* Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, M 19-93A.

the maximum number of public class members to make claims against the fund. One method of doing so could be by means of mass media advertising. Secondly, to pay damages to class members who appear and file claims as required by the Court. The unclaimed remainder would be disposed of pursuant to order of the Court.[7]

The program described above is desirable as it accomplishes the goals of the antitrust laws. It achieves the intent of private enforcement actions, separates the defendants from their illegal profits and returns the unlawful overcharges to as many consumers as possible.

Conclusion

Based upon the foregoing reasons amicus submits that the judgment of the Court of Appeals should be reversed and the case remanded to the District Court with directions to proceed to trial on Count Two of Hawaii's complaint.

Respectfully submitted,

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[7]One possible disposition is to place the unclaimed fund into the state treasury, thereby providing benefit to those who have been injured as well as to the general public. For another type of disposition see *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 63 Cal. Rptr. 724 (1967).